No. 19-792

IN THE

Supreme Court of the United States

VUGO, INC.,

PETITIONER,

V.

CITY OF NEW YORK,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY IN SUPPORT OF CERTIORARI

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REPLY BRIEF

The City of New York imposes a content-based restriction on speech: It prevents commercial advertising inside For-Hire Vehicles, (FHVs), but does not prevent non-commercial displays in the interior of such vehicles. Whether a particular message runs afoul of the City's ban depends entirely on what the message says.

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), this Court held that a content-based restriction on speech – that is, a restriction on speech that applies to particular speech because of the topic discussed or the idea or message expressed – is subject to strict scrutiny. A restriction that applies only to commercial speech is content-based under the *Reed* test because "'on its face' [it] draws distinctions based on the message a speaker conveys." *Id*. (*citing Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011).) The Sixth Circuit provides a helpful way to implement this test: "if a sign written in a foreign language would have to be translated (and interpreted)" to apply the regulation, then the regulation is content-based. *Thomas v. Bright*, 937 F.3d 721, 730 (6th Cir. 2019). Because a government could not apply a commercial speech ban to a message in a foreign language without first translating it and learning what it says, that regulation would be content-based.

This Court has found that restrictions on commercial speech are content-based. *See e.g.*, *Sorrell*, 564 U.S. at 571. But since its decision in *Reed*, this Court has not explicitly addressed what level of scrutiny applies to challenges to restrictions on commercial

speech. If, as the Court held in *Reed*, content-based restrictions on speech are subject to strict scrutiny, it follows that content-based restrictions on commercial speech should be subject to strict scrutiny. But prior to *Reed*, this Court held in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) that laws targeting commercial speech are subject to intermediate scrutiny.

The question raised by this case is whether *Reed* means what it says: Whether a content-based restriction on commercial speech should be evaluated using strict scrutiny – the level of scrutiny this Court said applies to content-based restrictions on speech in *Reed*, 135 S. Ct. at 2227 – or whether it should be evaluated under intermediate scrutiny – the level of scrutiny this Court said applies to restrictions on commercial speech generally in *Central Hudson*, 447 U.S. at 564 (1980).

This Court should grant the petition for writ of certiorari in this case because it is a good vehicle to determine whether laws that restrict speech because the message is commercial should be subject to strict scrutiny, and because *Reed* and its progeny are at odds with *Central Hudson*.

ARGUMENT

I. This case is a good vehicle for this Court to determine whether content-based restrictions on commercial speech should be analyzed using strict scrutiny review.

The City of New York restricts commercial advertising inside of FHVs, but does not prohibit non-commercial speech inside of FHVs. The City thus imposes a content-based restriction on commercial speech that does not apply to non-commercial speech. The facts of this case therefore present the question of which level of scrutiny applies: intermediate (under *Central Hudson*) or strict (under *Reed*).

A. The City's assertion that Vugo conceded the applicability of *Central Hudson* below is contrary to the record.

The City contends this case is not an appropriate vehicle on the theory that Vugo conceded the applicability of *Central Hudson* below. Br. in Opp. 7. But the City's assertion ignores the history of this case and contradicts arguments the City previously made. In both the district court and the Second Circuit, Vugo sought strict scrutiny review.

In its Memorandum in Support of its Motion for Summary Judgment, Vugo explicitly asserted that strict scrutiny was the appropriate level of review:

> A. The TLC Advertising Ban Should Be Struck Down Under Strict Scrutiny
>
> "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
>
> The TLC advertising ban is such a law.

S.D.N.Y. ECF Doc. 35 at 13-15.

The City's Memorandum in Support of its Motion for Summary Judgment admits that Vugo "urges this Court to evaluate the Challenged Regulations under strict scrutiny," S.D.N.Y. ECF Doc. 48 at 8, and asserts an explicit answer to the question presented to this Court: that *Reed* does not apply to content-based restrictions on commercial speech. S.D.N.Y. ECF Doc. 48 at 10-11.

The District Court itself acknowledged that Vugo sought strict scrutiny review, Pet. App. 48a, but stated that it need not determine the appropriate level of scrutiny because the regulations at issue could not pass muster under either standard. *Id.* Thus it struck down the regulations under *Central Hudson*.

After winning in the District Court, contrary to the City's contention, Vugo did not abandon its claim that strict scrutiny should apply. Vugo argued in its appellee brief that "it is clear that content-based restrictions on truthful commercial advertising are now considered to be 'presumptively invalid.'" 2d Cir. ECF Doc. 74 at 25. The Second Circuit acknowledged Vugo's argument, stating that "Vugo also contends that content-based restrictions on truthful commercial advertising are 'presumptively invalid' after *Sorrell*, Appellee Br. at 18, implying that something more akin to strict scrutiny applies." Pet. App. 14a. But the Second Circuit rejected Vugo's contention that strict scrutiny applies, stating "[w]e hold that the *Central Hudson* test still applies to commercial speech restrictions." *Id*. Thus, the Second Circuit acknowledged that Vugo argued strict scrutiny should apply in this case.

It is true that the Second Circuit opinion suggests Vugo conceded that *Central Hudson*'s intermediate scrutiny test applies. But the City takes this sentence out of context. The entire sentence by the Second Circuit reads: "Although Vugo expressly concedes that *Central Hudson's* intermediate scrutiny test applies, Vugo also contends that content-based restrictions on truthful commercial advertising are 'presumptively invalid' after *Sorrell*, . . . implying that something more akin to strict scrutiny applies." Pet. App. 14a. The assertion that Vugo conceded *Central Hudson* applies is contradicted by the rest of the Second Circuit's sentence – that Vugo asserted strict scrutiny review should apply.

Further, the Second Circuit's suggestion that Vugo conceded *Central Hudson* applied is incorrect. Nowhere in Vugo's appellee brief does it concede that intermediate scrutiny applies. In its brief, Vugo said "the *City admits* that the level of scrutiny to be applied to the TLC's ban on interior advertising in FHVs is the 'intermediate scrutiny' standard established in *Central Hudson*." 2d Cir. ECF No. 74 at 26 (emphasis added). The Second Circuit apparently read this sentence as a concession that intermediate scrutiny applies. But as the Second Circuit implicitly acknowledged, that would not make much sense since immediately before that statement Vugo asserted that strict scrutiny applies because content-based restrictions on commercial speech are "presumptively invalid." 2d Cir. ECF No. 74 at 25. The Second Circuit correctly treated these two statements by Vugo as alternative arguments – the exact alternative arguments it made before the district court: First, the restriction should be struck down under strict scrutiny. Second, even if strict scrutiny does not apply, the restriction should be struck down under intermediate scrutiny.

Vugo consistently asserted that strict scrutiny should apply to the restriction in this case in both the district court and the appellate court.

B. The City's assertion that the regulation does not apply only to commercial speech is contrary to the position the City took throughout this litigation.

The City's second basis for asserting that this case is not a proper vehicle is that the question of whether the regulation applies only to commercial speech was not determined by the lower courts. Br. in Opp.9. But throughout the entire litigation the City claimed that its regulation applied only to commercial speech. Only now does the City contend that its regulation might apply to non-commercial speech.

In its Memorandum in Support of its Motion for Summary Judgment, the City asserted that *Central Hudson* was the appropriate test to analyze restrictions on commercial speech. S.D.N.Y. ECF Doc. 48 at 8. Similarly, in its appellant brief, the City asserted that the challenged rules primarily affect commercial speech and thus were subject to *Central Hudson*. S.D.N.Y. ECF Doc. 49 at 26. Indeed, in footnote 4 of the City's appellant brief, it explicitly argued that Vugo incorrectly asserted that the regulations applied to non-commercial advertising. S.D.N.Y. ECF Doc. 49 at 27 n. 4.

Both courts below understood the challenged restrictions to apply to commercial speech alone. The Second Circuit found that the "parties agree that the prohibition on advertising in FHVs is a content-based restriction on commercial speech." Pet. App. 3a. And the District Court observed the "City invites this Court

to construe the regulations so as to only apply to commercial speech" to ensure that the regulations are not subject to strict scrutiny. Pet. App. 49a.

Now he City tells a different story. In its Brief in Opposition, the City claims it was Vugo, not the City, that sought to limit the inquiry to a challenge to only commercial speech under *Central Hudson*. The City's ploy here finds no support in the record.

As the District Court acknowledged, if the City's regulations applied to both commercial and non-commercial advertising, but did not apply to other non-commercial speech, then the City's regulations would be content-based and subject to strict scrutiny under *Reed*. Pet. App. 49a. The City had every incentive to ensure that only commercial advertising was implicated in this litigation. Now, having prevailed in the Second Circuit under *Central Hudson* analysis, the City attempts to reverse course, and claim that this Court should not grant the petition for certiorari because its regulation could apply to non-commercial advertising and the lower courts did not press or pass this issue.[1]

The City's attempt to create an issue out of something that it explicitly conceded in the lower courts is not a sufficient basis to deny Vugo's petition. The City has thus failed to show that this case is not a good vehicle for this Court to address the question of whether

[1] If the City's new argument had merit, at a minimum this Court should grant Vugo's petition, summarily reverse the Second Circuit's opinion, and remand this case to the Second Circuit to review under the proper standard for content-based restrictions on non-commercial speech.

content-based restrictions on speech are subject to strict scrutiny.

II. *Reed* and this Court's recent cases on the First Amendment are at odds with *Central Hudson*.

As explained above and in Vugo's petition for writ of certiorari, this Court's decision in *Reed*, is at odds with *Central Hudson*. As this Court held in *Sorrell,* "'[c]ommercial speech is no exception' to this rule of applying heightened scrutiny to content-based restrictions on speech." 564 U.S. at 566. *Sorrell* and *Reed* stand for the proposition that content-based restrictions require more searching review than the *Central Hudson* framework provides.

The City contends that because *Reed* did not involve commercial speech it does not conflict with *Central Hudson*. Br. in Opp. 11. But the fact that this Court has not yet addressed the conflict between *Reed* and *Central Hudson* does not mean they are not in conflict. *Sorrell* says restrictions that apply only to commercial speech are content-based, and so under *Reed*'s reasoning they should be subject to strict scrutiny. *Central Hudson* says lesser intermediate scrutiny governs restrictions applied to speech because of its commercial content. These rulings conflict. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, concurring in part and concurring in the judgment) ("when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'")

The City claims this Court has passed up multiple opportunities to address the question of whether strict scrutiny applies to restrictions on commercial speech after *Reed*. Br. in Opp. 11. But the cases the City points to did not squarely address the question presented here. In *Matal v. Tam*, this Court did not need to consider whether "trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in" *Central Hudson*, or instead receive more searching scrutiny because the trademark restrictions could not meet even the less stringent standard. 137 S. Ct. 1744, 1763-64 (2017). *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), did not involve commercial speech at all. And the issue in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) was not what level of scrutiny to apply to commercial speech, but whether a law prohibiting merchants from imposing a surcharge based on use of a credit card was a regulation of speech at all. The Court remanded the case to the lower court for the parties to litigate whether the law, as a regulation of speech, could survive First Amendment scrutiny.

The only case raised by the City that potentially involved the same issue is the Court's denial of the petition for writ of certiorari in *Leibundguth Storage & Van Serv. v. Vill. of Downers Grove, Inc.* — S. Ct. —, 2020 U.S. LEXIS 1492 (Mar. 2, 2020).[2] But "[n]othing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication

[2] Counsel for Petitioner in this case also represented the petitioner in *Leibundguth*.

that were the case here the merits would go against the petitioner." *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). And in any event, the facts in *Leibundguth* – in which the Seventh Circuit deemed the Village's ordinance to be content-neutral – did not as clearly frame the issue as this case does. *Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860-61 (7th Cir. 2019) ("We need not decide which decision — *Reed* or *Central Hudson* — must give way when a commercial-sign law includes content discrimination . . . . *This* ordinance is comprehensive.")

The City also asserts that the courts of appeals are not split and unanimously continue to apply *Central Hudson*. Br. in Opp. 12. The City says there is no split because the Seventh Circuit was wrong to characterize the Sixth Circuit's decision in *Thomas v. Bright*, 937 F.3d 721, as holding that "*Reed* supersedes *Central Hudson*." *Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860 (7th Cir. 2019). The City's position therefore relies on the Seventh Circuit's opinion being incorrect. Putting aside whether or not the Seventh Circuit's characterization of *Thomas* is correct, the fact that the Seventh Circuit believes there is a conflict shows the importance of the issue. If, as the City asserts, the issue is settled and not controversial, then why would Judge Easterbrook believe the Sixth Circuit held that *Reed* supersedes *Central Hudson*?

Further, the City ignores the fact that many lower courts seek guidance from this Court on applying *Reed* to commercial speech or see themselves bound by this Court's decision in *Central Hudson* even in light of

Reed. *See* Pet. App. 49a, ("absent an express holding from either the Supreme Court or the Court of Appeals for the Second Circuit."); *see also*, *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) ("absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny — which are directly applicable to the commercial-based distinctions at issue in this case — binding.") *See also*, Pet. 10-11 (listing cases). Without this Court resolving the apparent conflict between *Reed* and *Central Hudson*, most lower courts see themselves bound by this Court's decision in *Central Hudson*. *Peterson*, 150 F. Supp. 3d at 928 ("'If a precedent of th[e] [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court ... should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions.'") (*quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Even if the City were correct that there is no split between the lower courts, granting the petition in this case is important because unless the Court addresses the conflict between *Reed* and *Central Hudson*, the conflict will not be resolved.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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